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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 172

QUALITY MOLDING COMPANY, A CORPORATION,
Petitioner,

vs.

AMERICAN NATIONAL FIRE INSURANCE COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Quality Molding Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

When we refer to the Appendix attached to respondents' brief in the Court of Appeals, we will use the designation (Res. App.), giving the page. When we refer to the Appendix attached to petitioner's brief in the Court of Appeals, we will use the designation (Pet. App.), giving the page. When we refer to the Appendix hereto, we will use the designation (App. *infra*), giving the page.

(a) OPINIONS BELOW.

The Court of Appeals' opinion is reported in 287 F. 2d 313. (App. *infra*, VI-XI.) Its opinion on the prior appeal is reported in 272 F. 2d 779. (App. *infra*, I-V.)

(b) GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

i. The judgment of the Court of Appeals was entered February 20, 1961.

ii. The Petition for Rehearing was denied April 5, 1961. (App. *infra*, VI.)

iii. Section 1254(1) of Title 28, U. S. C., confers on this court jurisdiction to review the judgment by certiorari.

(c) QUESTIONS FOR REVIEW.

1. The District Court on January 30, 1959, awarded petitioner judgment against each of the respondents for its pro-rata share of $52,497.15 damages and "interest at 5% per annum from January 30, 1959." Petitioner appealed. The Court of Appeals affirmed. After the mandate issued, respondents moved the District judge to eliminate interest during the appeal. He denied the motion. The Court of Appeals has reversed his order.

After the judgments had been affirmed, did the District Court have jurisdiction to change the judgments for any reason existing when the mandate issued?

2. If respondents' motion to eliminate the judgment provision awarding interest during petitioner's unsuccessful appeal be considered as properly filed under Clause (6) of Rule 60(b), (U. S. C. (1958), Tit. 28, page 5180), does not Rule 60(b): "* * * the court may relieve a party * * * from a final judgment for the following reasons

• • • (6) any other reason justifying relief from the operation of the judgment" (App. *infra*, XII-XIII), vest the trial judge with discretion?

(a) In flagrant violation of Rule 11 of the Rules of Civil Procedure (U. S. C. (1958), Tit. 28, page 5137) (App. *infra*, XII) respondents each denied liability on its policy. After putting petitioner to every possible expense in making proof, respondents by an amended answer filed the day before the case was given to the jury admitted $52,497.15 was due. Wasn't this ample ground to deny the motion?

(b) Respondents earned 5% or more on the money during the appeal. (Pet. App. 6.) Wasn't this under Rule 60(b), Clause (6), sufficient reason to deny the motion?

(c) Respondents in an attempt to save on the judgments had elected not to tender the amount, interest and costs, as provided by Illinois statute. Wasn't this adequate basis for denial of respondents' motion?

3(a) Petitioner unsuccessfully appealed from judgments in its favor against respondents. After affirmance respondents moved to eliminate from the judgments the provision expressly allowing interest. The judge denied respondents' motion. The Court of Appeals has reversed.

In *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, the judgment creditor in a condemnation appealed because of inadequacy of the verdict. After affirmance and payment of the principal, he sued for interest on the judgment during pendency of his appeal. The trial court awarded him 5% interest on the judgment during his appeal. The Appellate Court affirmed. It based its holding upon (p. 433) Section 3 of Illinois Interest Statute:

> "(3) Judgments recovered before any court or magistrate shall draw interest at the rate of 5 per cent per annum from date of same until satisfied."

The court held Section (3) gave the judgment creditor interest during his unsuccessful appeal. *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, has remained the unquestioned law of Illinois for 28 years.

Wasn't the Court of Appeals under Sections 1652 and 1961 of U. S. C. (1958), Tit. 28, pages 5046, 5067, bound to follow the *Johnson* v. *Sanitary Dist.* holding?

(b) To enable the judgment debtor to relieve himself from the rule of *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, Illinois Legislature on July 18, 1955, amended said Section (3) by adding the following proviso:

> "Provided, however, that the judgment debtor may by tender of payment of judgment, costs and interest accrued to date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of appeal, writ of error, * * *."

Petitioner, the judgment creditor, unsuccessfully appealed. Respondents, judgment debtors, made no tender. The District judge denied respondents' motion to eliminate the judgment provision awarding interest.

Wasn't the District judge, under Sections 1652 and 1961, U. S. C. (1958), Tit. 28, pages 5046, 5067, bound to apply the Illinois statute?

Was not the District judge's denial of respondents' motion the only possible ruling under the Illinois statute?

(d) STATUTES INVOLVED.

Illinois Interest Statute before the 1955 Amendment (*Ill. Rev. Stat.* (1953), State Bar Ed., Chap. 74, p. 2311, Sec. 3):

> "3. *On judgment, award, etc.* Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) per centum per annum from the date of the same until satisfied. When judgment is

entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered to the time of rendering judgment upon the same, and made a part of the judgment. (As amended by act approved and in force June 17, 1891, L. 1891, p. 149.)"

Illinois Interest Statute after the 1955 Amendment (*Ill. Rev. Stat.* (1959), State Bar Ed., Chap. 74, p. 407, Sec. 3):

"3. *Judgment, award, report or verdict—Interest.* Judgments recovered before any court or magistrate shall draw interest at the rate of 5% per annum from the date of the same until satisfied. When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered to the time of rendering judgment upon the same, and made a part of the judgment; Provided, however, that the judgment debtor may by tender of payment of judgment, costs and interest accrued to date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of appeal, writ of error, or other steps to reverse, vacate or modify the judgment. As amended by act approved July 18, 1955. L. 1955, p. 2182."

U. S. C. (1958), Title 28, page 5046, Section 1652:
State laws as rules of decision:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

U. S. C. (1958), Title 28, page 5067, Section 1961:
Interest:

"Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any

case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law." June 25, 1948, c. 646, 62 Stat. 957."

Rule 11, Rules of Civil Procedure, Signing of Pleadings (U. S. C. (1958), Title 28, page 5137.) (App. *infra*, XII.)

Rule 60 (b), Rules of Civil Procedure, Relief from Judgment or Order (U. S. C. (1958), Title 28, page 5180.) (App. *infra*, XII-XIII.)

Rule 67, Rules of Civil Procedure, Deposit in Court (U. S. C. (1958), Title 28, page 5186). (App. *infra*, XIII.)

Illinois Eminent Domain Statute in force 1933 (Cahill Illinois Revised Statutes (1929), Chap. 47, p. 1245.)

Section 10 (App. *infra*, XIII-XVI.)
Section 13 (App. *infra*, XVI.)
Section 14 (App. *infra*, XVI.)

(e) STATEMENT OF CASE.

Petitioner's factory was destroyed by fire September 11, 1957. On September 10, 1958, petitioner sued the ten respondents and two other companies in twelve actions on twelve business interruption fire insurance policies in the Chicago Municipal Court. The ten respondents removed their cases to the United States District Court on the ground of diversity of citizenship. The ten cases were consolidated. By stipulation, the remaining two abide the result of the ten removed.

Each of respondents denied liability on its policy. Each in its answer averred: "Defendant denies that it is indebted to the plaintiff in any amount whatsoever." (Pet. App. 1.)

Trial began January 20, 1959. After petitioner closed its proofs, respondents' counsel argued a motion for directed verdict. The motion was overruled.

On January 28, 1959, the day before the case was given to the jury, respondents in an amended answer admitted $52,497.15 was due petitioner. (Pet. App. 2.) The jury fixed petitioner's loss at $52,497.15.

The judgment entered January 30, 1959, after fixing respondents' pro-rata shares of the $52,497.15, provides:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of plaintiff * * * for * * * interest at 5 per cent per annum from and after January 30, 1959." (Pet. App. 2.)

The policies remained in force. Plaintiff had prepaid premiums on eight policies which, on February 16, 1959, were unearned as follows: $53.08, $57.72, $69.24, $53.34, $37.72, $23.08, $13.22, $13.22. (Pet. App. 3.)

On February 16, 1959, respondents' counsel delivered conditionally to petitioner's counsel twelve checks totalling $52,497.15, and one for $145.00 for interest to February 19, 1959.

Before cashing any of the checks petitioner was required (1) to execute a general release to each of the twelve companies; (2) to surrender the twelve policies for cancellation; (3) to satisfy the judgments in full. The releases, the policies and the satisfactions of judgment were to be delivered to respondents' counsel before petitioner could cash any of the checks. Four of the checks, totalling $13,872.31, were payable through banks outside the State of Illinois. Respondents never offered to return the unearned premiums. They did not tender the costs. (Res. App. 12-13.) The costs were ascertainable by a glance at the record. (Pet. App. 4.)

Petitioner's counsel returned the checks. Respondents

never offered to pay anything except on the above conditions. Petitioner's motion for a new trial was overruled. Petitioner appealed. During the appeal respondents earned 5% per annum or more on the money. (Pet. App. 6.) The judgments were affirmed. Respondents did not ask the Court of Appeals to relieve them from payment of interest. Respondents in the District Court made a motion supported by affidavit asking the District Court to relieve them from paying interest. (Res. App. 6-14.) Petitioner filed a brief including a statement of fact verified by affidavit. (Pet. App. 8.) The District Court denied respondents' motion. The Court of Appeals has reversed.

(h) ARGUMENT.

I.

In holding that the District Court should have changed the judgments after affirmance, the Court of Appeals has decided an important federal question in conflict with the applicable decisions of this court. Its decision conflicts with the decisions of other circuits.

After the mandate had issued, the District judge had no power to change the judgment provision awarding interest for any reason which existed at the time of affirmance. If respondents desired to have the judgments changed for any reason existing at the time of affirmance, they should have applied to the Court of Appeals.

Moore's Federal Practice, 2d Ed., Vol. 7, p. 339, Par. 60.30 (2):

> "Where the appellate court has affirmed or reversed, then relief by the district court under 60 (b) must reckon with the appellate court's mandate. 'The authorities seem uniform that a mandate from a reviewing court is controlling as to all matters within the compass of such mandate and as to such matters the District Court, after remand, can take no further action.'"

The 7th Circuit's reveral conflicts with *Butcher* v. *Sherrerd* (1953), 206 F. 2d 259 by the third circuit. On each of three appeals the judgment had been affirmed. Nineteen months later the District Court allowed a motion for a new trial under Rule 60(b).

Issuing a mandamus to expunge the order, the court said (p. 262):

> "Where the judgment has been affirmed on appeal and the mandate handed down it is beyond the power

> of the lower court to disturb the judgment without leave of the appellate court. This procedure is required by long-settled principles."

In *Briggs* v. *Penn. R. Co.*, (1948, 2 Cir.) 164 F. 2d 21, the trial judge gave judgment for defendant notwithstanding the verdict. The Court of Appeals reversed. It directed judgment be entered on the verdict. The District Court added interest. The Court of Appeals reversed. It held:

> (1) Had plaintiff moved to recall the mandate, plaintiff would have been entitled to interest from the date of the dismissal.
>
> (2) The District Court was without power to award interest.

Briggs v. *Penn. R. Co.*, 164 F. 2d 21, was reviewed by this court in 334 U. S. 304, 92 L. ed. 1403, 68 S. Ct. 1939. Affirming the judgment this court said (p. 306):

> "In its earliest days this court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court."

This court further said (306):

> "If any enlargement of that amount were possible, it could be done only by amendment of the mandate."

Here the judgments expressly awarded interest. They had been affirmed. The District Court had no power except to enforce the judgments as affirmed. If respondents had ground to have the mandate amended so as to eliminate interest, they should have applied to the reviewing court.

In re Washington & Georgetown R. R. Co. (1891), 140 U. S. 91, 35 L. ed. 339, 11 S. Ct. 673, on December 18, 1885, McDade recovered judgment for $6,195.00. Nothing was said in the judgment about interest. Defendant prosecuted a writ of error and judgment was affirmed. On motion of McDade, the trial court ordered that execution issue for $6,195.00 "with interest thereon at 6% per annum" from

December 18, 1885. This Court ordered expunged the provision allowing interest.

This court said (p. 97):

> "* * * we render our decision solely upon the point that, as neither the special term nor the general term allowed interest on the judgment, and as this court allowed no interest in its judgment of affirmance, all that the general term could do, after the mandate of this court went down, was to enter a judgment carrying out the mandate according to its terms, * * *."

The Court of Appeals' decision is in conflict with a decision of the Tenth Circuit.

In *Zurich Gen. Acci. & Liab. Co.* v. *Mid-Continent Pet. Co.* (1930, 10 Cir.), 43 F. 2d 358, the judgment creditor appealed for inadequacy of the verdict. After affirmance the defendants moved to be relieved from interest during the appeal. The Court of Appeals held that the motion had properly been made before it. The court said (p. 358):

> "The motion is based on the ground that appellee was prevented meantime from paying the judgment. *If the record sustains the position taken, the relief would be granted.*" (Emphasis by us.)

Since the reviewing court was the proper forum to hear the motion, respondents' motion was not properly made in the district court.

In *Home Indemnity* v. *O'Brien* (1940, 6 Cir.), 112 F. 2d 387, the court affirmed $25,000.00 judgment for plaintiff. After the mandate was filed, the District Court corrected the judgment by adding thereto, "with interest thereon at 5% from July 14, 1935, date of institution of suit."

Reversing the order, the court said (p. 388):

> "* * * The District Judge was without power to alter the judgment affirmed by us and that it was his duty upon receipt of the mandate, to proceed with the execution of the judgment, and no more."

Professor Moore comments on the committee proposal for this court to amend Rule 60(b) so as to permit the trial court to alter a judgment affirmed by a reviewing court. Commenting upon the proposed amendment, he says (*Moore's Federal Practice*, 2d Ed., Vol. 7, p. 907, Par. 60.42):

> "Unlike the independent action, a motion for relief under 60(b) must be made to the district court which rendered the judgment and is a continuation of the action which resulted in the judgment. As previously pointed out there are times when a motion for relief does not raise matters that are within the compass of the mandate, and in that event leave of the appellate court is unnecessary. But where the action which the district court is asked to take on the motion would disturb the judgment which the appellate court's mandate ordered, or would otherwise be inconsistent with the mandate, the pre-Rules doctrine was that the district court lacked power of proceed unless and until leave is granted by the appropriate appellate court. This practice was endorsed by the Court in the *Hazel-Atlas* case (322 U. S. 238); and has been followed generally in the adjudged cases under Rule 60."

The judgment of the 7th Circuit conflicts with the decisions of the other Circuits. It will cause confusion. If the established practice is to be changed by judicial decision, this court should set the matter at rest. Until this court passes on the question, the decision of the 7th Circuit will render uncertain the procedure to be followed for post-judgment relief after appellate review. This court should grant certiorari in order to resolve the irreconcilable conflict.

II.

If one assume that the District Court had jurisdiction after the mandate was filed to grant a motion changing the judgment, respondents' motion would come within the terms of Clause (6) of Rule 60 (b), U. S. C. (1958) Title 28, page 5180:

> "On motion and upon such terms as are just the court may relieve a party * * * from a final judgment * * * for the following reasons: * * * (6) any other reason justifying relief from the judgment * * *." (App. *infra*, XII-XIII.)

The court "may relieve a party" for a reason "justifying relief" from the judgment. In determining whether respondents' motion justified the relief the trial judge was bound to consider the fact that respondents, in flagrant violation of Rule 11, denied all liability upon their policies.

Rule 11, U. S. C. (1958) Title 28, page 5137, Signing of Pleadings:

> "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name * * *.
>
> * * * * *
>
> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay.
>
> * * * * *
>
> For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." (App. *infra*, XII.)

It is difficult to conceive of a more wilful and flagrant violation of Rule 11. Petitioner's factory was destroyed by fire September 11, 1957. Respondents a year later each denied liability on its policy. After petitioner had closed

its proofs, respondents admitted petitioner was entitled to $52,497.15 under the policies. Proof under business interruption policies requires the maximum of labor and expense.

Respondents denied liability on their policies. (Pet. App. 1.) The day before the case was given to the jury they amended their answers admitting petitioner was entitled to $52,497.15. (Pet. App. 2.)

The 10th Circuit in *Zurich General Acc. & Liab. Co.* v. *Mid-Continent Pet. Co.*, 43 F. 2d 358, decided a motion by the judgment debtor to be relieved from payment of interest during the judgment creditor's unsuccessful appeal. Defendant had tendered $7,500.00, the amount for which judgment was afterwards awarded. The defendant withdrew its answer and contested the entire amount. Holding that its conduct in contesting the entire amount was a reason to deny the judgment debtor's motion to be relieved from interest during the appeal, the court said (p. 358):

> "But it appears from the judgment entry that the tender of $7,500 was abandoned, when appellee sought to withdraw its answer and file an amended answer 'denying all liability whatsoever to the plaintiff,' and moved for judgment to that effect. *Appellee's contest of the entire demand precludes allowance of the motion.*" (Emphasis by us.)

The *Zurich* holding conflicts with the holding of the Seventh Circuit. The *Zurich* case was decided in 1930. The Federal Rules of Civil Procedure became effective September 16, 1938. Respondents' denials constitute flagrant violation of Rule 11. The filing of an answer denying liability was ground to deny the motion before the adoption of Rule 11. *A fortiori*, it was a ground to deny the motion when the answers were filed in this case in wilful violation of Rule 11.

Petitioner showed in the trial court that during the appeal (a) money invested in short term bonds available would yield 5 per cent; (b) insurance companies in the Chicago area earned 6 per cent or more on the money they had to invest. On the basis of (a) and (b) petitioner represented respondents had earned 5 per cent or more on the money during the appeal. (Pet. App. 6.) On this ground the District judge in exercise of his discretion properly denied respondents' motion.

Respondents in an attempt to save on the judgments elected not to tender the amount as provided by Illinois statute. Wasn't this a basis for the District judge to exercise his discretion by denying respondents' motion? Respondents could have deposited the money with the clerk under Rule 67, U. S. C. (1958) Tit. 28, page 5186. (App. *infra*, XIII.) Respondents by this means would have been relieved from paying interest. Respondents were unwilling, however, to forego the income they were receiving on the money.

The 7th Circuit's ruling in this case conflicts irreconcilably with the holding of the 10th Circuit in *Zurich General Acc. & Liab. Co.* v. *Mid-Continent Pet. Co.*, 43 F. 2d 358. On this ground this Court should issue the writ of certiorari. The holding of the 7th Circuit in this case nullifies Rule 11. Rule 11 was intended to prevent the filing of *a false* answer for the purpose of wearing out the opponent. Rule 11 has never been construed by this Court. It was promulgated to stop the filing of spurious pleadings. This question is important to all litigants and attorneys. It is a question of federal law that has not been but should be settled by this Court.

In holding that the district judge was without discretion in deciding a motion under Rule 60(b) the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

III.

The Court of Appeals decision is an unexplainable disregard of Illinois law.

(a) *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, is squarely in point. Upon a petition to condemn the court on January 9, 1930, rendered judgment in favor of Johnson for $16,500 against Sanitary District.

Johnson appealed to Illinois Supreme Court.

Sanitary District filed its $33,000 bond payable to Johnson to entitle it to possession.

On July 28, 1930, Sanitary District took possession.

At February Term, 1931, Illinois Supreme Court affirmed.

On March 7, 1931, Sanitary District paid Johnson the $16,500 without waiver of Johnson's claim for interest on the $16,500 from the time Sanitary District "took possession of said lands up to the time of payment."

Johnson sued Sanitary District for interest on the $16,500. The court gave judgment for Johnson against Sanitary District for interest at 5% on $16,500 from July 28, 1930, the day Sanitary Dist. took possession to March 7, 1931, the day Sanitary District paid Johnson the $16,500. The court states the question for decision (p. 433):

> "Was the judgment * * * such a judgment as would under the statute draw interest from the day the judgment was rendered until the time the judgment was paid?"

The court quotes the Illinois statute (p. 433):

> "Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) per centum per annum from the date of the same until satisfied."

The court noted that the trial judge had awarded judgment for interest from the day Sanitary District had taken possession to the day the $16,500 was paid. It continued (p. 433):

> "In the case of the *University of Chicago* v. *Chicago*, 258 Ill. App. 189, the court in passing upon the same question made an exhaustive review of all the cases relating to payment of interest on judgments, and on page 196 say: '*A judgment for compensation entered in a proceeding to condemn property under that act, is by the provisions of the act conditional and not final, and that as the same has been consistently construed by this and the Supreme Court of the State, a judgment entered pursuant thereto does not draw interest until the condemnor takes possession of the property.*' See also *Cook* v. *South Park Commissioners*, 61 Ill. 115, in which the court says: 'We think that interest should be allowed upon judgments, when final, in proceedings of this character. They are within the spirit, if not the terms, of the statute which allows interest upon all judgments recovered'." (Emphasis by us.)

In answer to the contention that Johnson should be denied interest on his judgment because of his unsuccessful appeal delaying payment, the court said (pp. 434-435):

> "We do not think it is sufficient for the appellant to say that because the appellee appealed the case, it put it beyond the power of appellant to pay the sum of money that had been awarded as damages to the appellee. The appellee had a right to appeal from the decision of the county court. It was the right given him by law, and the mere fact that he prosecuted his appeal, as he was entitled to do under the law, should not prevent him from recovering interest when the appellant entered and took possession of the property and exercised its right of ownership over the same. All of the cases to which our attention has been called where this question has been alluded to seem to hold that *the owner of the land is entitled to interest on the judgment awarded in any condemnation proceed-*

ing from the time that the condemnor takes possession of the premises until the amount of the judgment is paid." (Emphasis by us.)

Three sections of Illinois Eminent Domain Statute then in force are appended hereto.

Section 10 provides that if the award is not paid, the judge should afterwards dismiss the proceedings. The property owner would be entitled to compensation for his costs and attorneys fees. (App. *infra*, XIII-XIV.)

Section 13 provides that in the event of an appeal the condemnor by posting a bond could take possession of the property. (App. *infra*, XIV.)

Section 14 provides that the condemnor might after the award pay the money to the county treasurer. (App. *infra*, XIV.) (Illinois Law, 1871-2, p. 402.)

The situation there is identical with the situation here. Sanitary District, under Section 14 of Illinois Eminent Domain statute (App. *infra*, XIV), could have paid the money to the county treasurer and thereby stopped the interest. Here, respondents could have deposited the money with the clerk of the court under Rule 67 (App. *infra*, XIII) with like effect.

The law of this case had been established back in 1889 in *C. & C. R. R. Co.* v. *Henry* (1889), 31 Ill. App. 456. In a condemnation proceeding the court awarded judgment in favor of Henry. Because of inadequacy of the verdict, Henry, appealed. (121 Ill. 264, 12 N. E. 724.) The railroad company gave bond under Section 13 of Illinois Eminent Domain Statute. (App. *infra*, XIV.) It took possession. Afterwards the Supreme Court affirmed. Henry sued upon the bond. Held (p. 458): "That the liability was for the amount of the judgment with interest and costs."

The Court of Appeals purports to distinguish *Johnson* v. *Sanitary Dist.*, 269 Ill. App. 429, reciting that the condemnor had taken possession of the property. Whenever a final money judgment is rendered the plaintiff or someone on his behalf has given consideration or plaintiff or some one because whom he claims has suffered a legal detriment. The judgment in each instance is to compensate. Respondents here received premiums for their policies. This is the same where the condemnor has received the property for which the judgment is rendered.

The Court of Appeals asserts that we misquoted *Johnson* v. *Sanitary Dist.*, 269 Ill. App. 429, at 434 (App. *infra*, IX-X) by omitting "when the appellant entered and took possession of the property and exercised its right of ownership over the same." The statement by the court with the omitted clause italicized by us is:

> "We do not think it is sufficient for the appellant to say that because the appellee appealed the case, it put it beyond the power of appellant to pay the sum of money that had been awarded as damages to the appellee. The appellee had a right to appeal from the decision of the county court. It was the right given him by law, and the mere fact that he prosecuted his appeal, as he was entitled to do under the law, should not prevent him from recovering interest *when the appellant entered and took possession of the property and exercised its right of ownership over the same.*" (269 Ill. App. 429 at 434.)

The *Johnson* opinion continues:

> "All of the cases to which our attention has been called where this question has been alluded to seem to hold that the owner of the land is entitled to interest on the judgment awarded in any condemnation proceeding from the time that the condemnor takes possession of the premises until the amount of the judgment is paid." (269 Ill. App. 429 at 435.)

The *Johnson* opinion (p. 433) had previously stated that under the holdings of the Illinois Supreme Court and the Illinois Appellate Court a judgment in condemnation under Illinois Eminent Domain statute does not draw interest until the condemnor has taken possession. Under Section 10 of the statute (App. *infra*, XIII-XIV), the condemnor after the award was made retained a right to dismiss the suit. It is stated in the *Johnson* case (p. 433) "by the provisions of the act" the judgment is "conditional and not final."

We should not have made the error of indicating the sentence had come to an end. *Johnson* v. *Sanitary Dist.*, however, holds that the judgment creditor is entitled to interest during his unsuccessful appeal. The judgment creditor could have satisfied the judgment by payment to the county treasurer under Section 14. (App. *intra*, XIV.)

We did not misstate the *holding* in *Johnson* v. *Sanitary Dist.*, 269 Ill. App. 429.

In *People* v. *Howarth* (1953), 415 Ill. 499, at 511; 114 N. E. 2d 785, at 791, the trial court had held an attorney in contempt for misquoting a letter. The statement by the court reversing the judgment is applicable here (pp. 511, 791):

> "Howarth * * * in his answer explained that the mistake occurred in summarizing the letter for brevity's sake and failing to remove quotation marks. The language appearing in the petition did not in any material respect change the meaning of the State's Attorney's letter."

The omission by us of the clause, "when the appellant entered and took possession of the property and exercised its right of ownership over the same," did not misrepresent the holding of the case. The case held that under section 3 of Illinois interest statute the judgment creditor was entitled to interest during his unsuccessful appeal.

The Court of Appeals cites two Illinois cases. (1) *Moll* v. *Sanitary Dist.*, 228 Ill. 633, 81 N. E. 1147. The case holds that the creditor could not recover the principal in one suit and then sue for interest in another. In condemnation proceedings against Moll's land $6,000 was awarded Moll against Sanitary District. Sanitary District paid the $6,000 to the County Treasurer (Section 14, *infra*, XIV), and took possession. The judgment was reversed. On a second trial the verdict was $20,312.80. The court gave judgment with interest from that date. Moll moved for allowance of interest from date of first judgment. Motion was denied. Moll filed a new suit. Two of the counts claimed interest on the principal paid him on the condemnation judgment. A third count claimed for damages to his land. The court held the first two counts bad on the demurrer. Moll should have recovered interest in the first suit. This case is cited by the court in *Johnson* v. *Sanitary Dist.*, 269 Ill. App. 429, at 433.

In *Moll* v. *Sanitary Dist.*, 228 Ill. 633 81 N. E. 1145 the condemnor deposited the $6,000 awarded by the first jury (228 Ill. 633 at 634) with the county treasurer in accordance with section 14. (App. *infra*, XIV.)

(2) *Kinne* v. *Duncan*, 323 Ill. App. 362, 55 N. E. 2d 545. (Opinion printed in respondent's brief below, pp. 27-35.) Kinne sued in equity to remove cloud and for an accounting. Duncan asserted a lien on plaintiff's interest in an oil and gas lease. $16,000 had accumulated in the partnership profits. The trial court gave Duncan a lien on the funds with interest. The Appellate Court reversed the decree in part. The other provisions in favor of Duncan were reversed by the Supreme Court. The case did not involve allowance of interest under the Illinois interest statute.

In Illinois, interest is allowed or disallowed in chancery proceedings according to the circumstances of the case.

The rule is stated in *McKey* v. *McCoid* (1921), 298 Ill. 566, at 572; 132 N. E. 233:

> "The rule followed in equity is to allow interest where warranted by equitable considerations, but where such allowance does not comport with justice and equity it may be disallowed."

The rule is stated in *Kaifer* v. *Kaifer* (1936), 286 Ill. App. 433, at 440; 3 N. E. 2d 886:

> "The rule followed in equity is to allow interest where warranted by equitable considerations and to refuse such allowance when it does not comport with justice."

The Court of Appeals ignored the prerogative of the trial court to find the facts.

The fact that the law of Missouri is different is no excuse for the Court of Appeals to disregard the Illinois law.

(b) To enable the judgment debtor to relieve itself from the rule of *Johnson* v. *Sanitary Dist.* on July 18, 1955, Illinois added a proviso to section 3 of its interest statute. Under the proviso the judgment debtor by tendering the amount of judgment, interest and costs can relieve itself from liability for interest during an appeal. The statute now reads:

> "Judgments recovered before any court or magistrate shall draw interest at the rate of five per cent per annum from the date of same until satisfied.
>
> * * * * *
>
> *Provided, however, that the judgment debtor may by tender of payment of judgment, costs and interest accrued to date of tender, stop the further accrual of interest on such judgment notwithstanding the prosecution of appeal, writ of error,* * * *." (Emphasis by us.)

Here, respondents never made any tender as they had a right to do under the above statute. Under the above stat-

ute as construed by Illinois courts respondents were liable for interest during pendency of the appeal. Under Sections 1652 and 1961 of Title 28, of U. S. C., the Court of Appeals was bound to apply the Illinois statute.

The Court of Appeals ignored the Illinois interest statute. The statute is clear. If there were basis for difference of opinion before the addition of the proviso in 1955, that basis has been removed by the amendment.

The statute awards interest on judgments. The proviso makes an exception upon condition that the judgment debtor tender the amount of the judgment, interest and costs. The Supreme Court of Illinois has recently passed on the requisites of a tender.

In *River Valley Cartage Co.* v. *Ins. Co.* (1959), 17 Ill. (2) 242, 161 N. E. (2) 101, Sawyer recovered for personal injury a $175,000.00 judgment against River Valley Cartage Co. on May 13, 1955. Hawkeye Security Ins. Co. had issued to River Valley Cartage a $50,000.00 liability policy.

The insurer agreed to pay (p. 244), "all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of the judgment as does not exceed the limit of the company's liability thereon."

On July 3, 1956, Hawkeye tendered $50,000.00 on the judgment. The tender was refused. The insurer contended that its duty to pay interest ceased when it tendered the $50,000.00. The court held (pp. 246-247):

> "A valid tender by the debtor must be 'sufficient to cover all that the creditor then has a right to recover, whether of debt, interest or costs. If he tender less, then the tender is not good, * * *.' *Sweetland* v. *Tuthill*, 54 Ill. 215, 216.
>
> "Since the insurer conceded that it was liable for some interest and costs at the time of the alleged ten-

der, although it disputed the exact amount, it should have been clear to the insurer that it did not make a legally valid tender."

* * * * *

"We hold that the tender of $50,000 did not operate to terminate the insurer's continuing obligation for interest on the entire $175,000. (Cf. Ill. Rev. Stat. 1957, chap. 74, par. 3.) That obligation continues until satisfied."

The Court of Appeals ignores the Illinois interest statute. The claims represented in these cases are created by Illinois law. The removal petitions were based upon diversity of citizenship. The refusal of the Court of Appeals to apply Illinois law is a ground for certiorari under the decisions of this Court. *Six Companies of California* v. *Joint Highway District*, 1940, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 114; *West* v. *American Telephone & Telegraph Co.*, 1940, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 139; *Stoner* v. *New York Life Ins. Co.*, 1940, 311 U. S. 464, 61 S. Ct. 336, 85 L. Ed. 284; *Fidelity Union Trust Co.* v. *Field*, 1940, 311 U. S. 1969, 61 S. Ct. 176, 85 L. Ed. 109.

CONCLUSION.

The decision of the Court of Appeals that the District judge had jurisdiction to grant the motion conflicts with the decisions of the other Courts of Appeals. It can but create uncertainty and additional expense to litigants. The decision of the Court of Appeals is squarely contrary to the applicable two Illinois decisions. The decision of the Court of Appeals ignores the applicable Illinois statute. The decision of the Court of Appeals that the District judge had no discretion in denying the motion has so far departed from the accepted and usual course of judicial proceedings to call for the exercise of this Court's power and supervision.

It is respectfully submitted that the public interest calls for this Court's granting of a writ of certiorari and the determination of the questions presented in this petition.

Respectfully submitted,

ALVIN G. HUBBARD,
REESE HUBBARD,
Attorneys for Petitioner.

APPENDIX.

OPINIONS BELOW.

In the United States Court of Appeals
For the Seventh Circuit.

September Term and Session, 1959

Nos. 12659 through 12668.

Quality Molding Company,
Plaintiff-Appellant,
vs.
American National Fire Insurance Company, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

December 15, 1959.

Before Duffy and Schnackenberg, *Circuit Judges*, and Platt, *District Judge*.

Duffy, *Circuit Judge*. Plaintiff sued in the Municipal Court of Chicago on twelve fire insurance policies with business interruption forms affixed. Ten of the defendants removed their cases to the United States District Court where the ten cases were consolidated for trial. By stipulation, the decision which will be reached in the instant litigation will govern and control the two cases not appealed. The instant suit was tried to a jury which rendered a verdict for the plaintiff in the sum of $52,497.15. Plaintiff

filed a motion for a new trial claiming, *inter alia*, the verdict was grossly inadequate. This motion was denied. Judgment was entered on the verdict from which this appeal was taken.

Plaintiff was a manufacturer of plastic flower pots or planters for household use. Plaintiff owned a factory in Chicago containing about 11,500 square feet. Plaintiff leased a contiguous building on the west which contained about 3,000 square feet. Plaintiff also leased 4400 square feet of space in a building a block east on the same street. The building which was burned in the early morning of September 12, 1957, was the building which was owned by plaintiff.

The evidence discloses that plaintiff had at least three kinds of fire insurance: 1) on the building owned by it; 2) on the contents of the buildings; and 3) business interruption. The first two are not involved in the instant suit. However, plaintiff claims the wording of the policies providing insurance for business interruption contained language broad enough to cover physical property such as "raw stock" and "stock in progress," in the amount of $33,207.76. Plaintiff also claims its loss resulting from interruption of business exceeds $200,000.00.

An Illinois statute (Ill. Rev. Stat. 1959, ch. 73, § 1009) provides, as do many other state statutes, for a standard form of fire insurance policy. Plaintiff argues that some of the language in the standard forms used in the policies in suit is not expressly negated by "Business Interruption Form No. 2," an endorsement which is appended to the policies and which is the basis for the suits at bar. We have carefully examined the policies and endorsements, and are convinced those business interruption policies here at issue do not cover "raw stock" and other items which would come under the classification of contents.

After the fire, plaintiff discovered it was considerably under-insured as to contents, but that fact does not warrant an extension of coverage, by interpretation, of the business interruption policies. It follows the disputed item of $32,207.76 was properly excluded by the Court as an item of damage.

The remaining point is the argument of plaintiff that its damage, because of business interruption caused by the fire, was much larger than allowed by the jury. Plaintiff states it is entitled to recover $94,000.00 for loss of profit in the twelve months following the fire. It claims $73,000.00 for what it calls loss resulting from down time on its machinery. Also $11,000.00 is claimed for abandoning its building on Diversey Avenue. A number of other smaller amounts are likewise claimed as damages.

Business interruption insurance is insurance under which the insured is protected in the earnings which insured would have enjoyed had there been no interruption of business. 44 C. J. S. "Insurance" § 48; *Miller* v. *Hocking Glass Co.*, 6 Cir., 80 F. 2d 436, 437. The purpose of business interruption insurance is to protect the prospective earnings of the insured business. *National Union Fire Insurance Company* v. *Anderson-Pritchard Oil Corporation*, 10 Cir., 141 F. 2d 443.

The policies in the cases at bar covering business interruption provide the insured may recover on the net profit lost as a result of fire, together with certain charges and other expenses which continued during the interruption of the business. Also, the insured may recover expenses necessarily incurred in the reduction of loss. The policies provide that the period for which recovery may be had is limited to "only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such described property as has been damaged or destroyed."

After the fire, plaintiff changed the location of its business. It obtained larger quarters and combined its various departments such as production, warehousing, packaging and offices all under one roof. The move to larger quarters had been considered prior to the fire. Plaintiff now claims the move was the result of the fire.

There was a marked conflict in the evidence presented to the jury upon the various items of damage. Although the plaintiff claimed a loss of profits for nine months immediately following the fire in the sum of in excess of $73,000.00, the records of the plaintiff showed that for the nine months ending August 31, 1957, there had been a net profit before taxes of $23,959.92, and a net profit after taxes of $17,212.09.

In computing lost profits in its claim against defendants, plaintiff allowed itself a margin of profit of close to thirty cents on the dollar. The books of the company showed, however, that plaintiff's margin of profit before the fire was slightly less than three cents on the dollar.

The insured contended that it would require at least nine months to twelve months, with the exercise of due diligence, to rebuild, replace and restore the damaged property and resume normal operations. On the other hand, the insurers submitted evidence that it would take only five months and thirteen days to restore the premises and commence operation at the old location.

We have examined the various claims for damages which were submitted. All of these matters were clearly questions for the jury, and we cannot say that such findings were clearly erroneous. We think the jury was justified in determining the total damage of plaintiff to be $52,497.15 which was the amount the defending insurance companies admitted was due.

We have considered the other claims of error submitted

by plaintiff such as remarks made by the Court in the presence of the jury; the insistence by the Court that a certain witness be produced; and rulings on admission of certain evidence. We find no error.

Judgment

AFFIRMED.

UNITED STATES COURT OF APPEALS
Seventh Circuit.

No. 13102.

Quality Molding Company, a corporation,
Plaintiff-Appellee,

vs.

American National Fire Insurance Company, et al.,
Defendants-Appellants.

Feb. 20, 1961.
Rehearing Denied April 5, 1961.

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

DUFFY, *Circuit Judge.*

The point at issue on this appeal is whether the defendant insurance companies are required to pay interest on the judgment against them from the date of the judgment to the date of satisfaction thereof. Defendants insist they were prevented from making an earlier payment of the judgment because plaintiff, dissatisfied with the judgment which it obtained, appealed (unsuccessfully) to this Court.

Plaintiff sued in the Municipal Court of Chicago on twelve fire insurance policies with business interruption forms affixed. Ten defendants removed their cases to the United States District Court. By stipulation, the result which would finally be reached in the cases so removed, would govern the disposition of the two cases which have not been removed. The cases were consolidated and were

tried in the United States District Court before a jury which rendered a verdict in favor of plaintiff in the sum of $52,497.15. Plaintiff filed a motion for a new trial claiming the verdict was grossly inadequate. The motion was denied. On appeal, we affirmed. *Quality Molding Company* v. *American National Fire Insurance Co.*, 7 Cir., 272 F. 2d 779.

The original judgment was entered on January 30, 1959. The pro rata liability of each defendant was calculated by the Court prior to the entry of the judgment. The judgment order contained the amount due and owing to plaintiff from each defendant together with interest of 5 percent per annum from and after January 30, 1959. Plaintiff's motion for a new trial was filed on February 9, 1959.

On February 16, 1959, defendants' counsel mailed to counsel for plaintiff, sight drafts from each of the defendants in the amount of the judgments assessed against them. Defendants' counsel also mailed a check for $145.83 covering interest on the entire judgment from the date of the judgment to February 19, 1959. Defendants' counsel also offered to pay plaintiff's costs upon being advised as to the amount. Defendants' counsel included with the drafts and check, a general release covering each policy, a satisfaction of judgment and a stipulation as to the two suits then pending in the Municipal Court of Chicago.

The following day, plaintiff's counsel returned all of the drafts and the check, refusing to accept them in satisfaction of the judgment. Plaintiff's motion for a new trial was denied and the appeal to this Court followed.

A few days after our mandate was filed in the District Court, defendants' counsel again wrote to counsel for plaintiff asking whether plaintiff would now accept the drafts and check tendered to it on February 16, 1959. On February 9, 1960, plaintiff taxed costs in the amount of

$390. These costs have been paid by defendants without objection.

On February 10, 1960, without further communication with counsel for the insurers, plaintiff's counsel caused the Clerk of the District Court to issue writs of *fieri facias* against each of the defendants, directing the Marshal to levy against each of the individual defendants the total amount of the judgment and interest thereon from January 30, 1959, together with costs. Thereafter, defendants moved the District Court to quash the executions and to order satisfaction of the judgments upon payment of the principal sums specified against each company in the judgment order of January 30, 1959, together with court costs and interest thereon from January 30, 1959 to February 19, 1959.

On June 3, 1960, the District Court quashed the writs of *fieri facias*. However, the Court denied defendant's motion that they not be required to pay interest from February 20, 1959 to March 2, 1960, the period during which plaintiff's unsuccessful appeal was pending.

[1, 2] It is a recognized principle of law in Illinois that interest will not be awarded to a judgment creditor covering the period of its unsuccessful appeal from a judgment in its favor. *Kinne* v. *Duncan*, 323 Ill. App. 363, 55 N. E. 2d 545. The principle that one causing a delay in the satisfaction of a judgment is not entitled to interest thereon is recognized in Illinois. *Moll* v. *Sanitary District of Chicago*, 228 Ill. 633, 81 N. E. 1147; 23 I. L. P. Interest § 64. Other jurisdictions have also adopted the principle that a judgment creditor who appeals from a judgment in its favor and attacks the judgment as invalid, is not entitled to interest if it is unsuccessful on its appeal. 47 C. J. S. Interest § 59.

In *Kinne* v. *Duncan*, *supra*, the Illinois court cited and quoted with approval *State ex rel. Southern Real Estate*

& Financial Co. v. City of St. Louis, 234 Mo. App. 209, 115 S. W. 2d 513. The Missouri court stated, 115 S. W. 2d 515,

> "The underlying theory upon which interest is allowed on money judgments is that from the moment of the entry of the judgment the amount thereof is due from the judgment debtor, with the necessary consequence that the latter is thereafter in default until the judgment is satisfied, and is therefore required to pay interest on his debt as compensation for his further retention and use of the judgment creditor's money. But such exaction of interest obviously implies that the judgment creditor is standing upon the amount of the judgment as the amount which is then due him from his judgment debtor, and that any delay in satisfaction of the judgment, as by an appeal therefrom, is solely occasioned by the act of the judgment debtor himself, * * *.
>
> "* * * But where it is the judgment creditor himself who is dissatisfied, and he appeals upon the ground of what he conceives to be the inadequacy of the judgment which was rendered in his favor, then if the judgment is affirmed he is held not to be entitled to interest on the judgment pending the disposition of the appeal, since it was by his own act that the proceeding was delayed and prolonged until such time as judicial sanction of the correctness of the judgment finally culminated in its affirmance by the appellate court." (Citing cases from various jurisdictions.)

[3] Under the circumstances of this case, a formal tender was unnecessary. It has been held in Illinois, that a tender is unnecessary where it is known that the tender would be unacceptable. *Daren* v. *Downey*, 378 Ill. 543, 39 N. E. 2d 45; *White* v. *Thomas*, 39 Ill. 227; *West Suburban Finance & Thrift Co.* v. *Herbst*, 300 Ill. App. 322, 21 N. E. 2d 37.

The only Illinois case relied upon by plaintiff is *Johnson* v. *Sanitary District of Rockford*, 269 Ill. App. 429. That

case involved a condemnation proceeding in which judgment had been entered in the sum of $16,500. The date of the judgment was January 9, 1930. The Sanitary District entered into possession of the property on July 28, 1930. Johnson appealed contending the award was not sufficient. The Supreme Court affirmed the award and the Sanitary District paid the principal of the judgment on March 7, 1931. On his second appeal, Johnson complained that the Sanitary District refused to pay him either rent for the use of the property after the taking, or interest on his judgment. The Appellate Court allowed interest on the judgment, not from the date of the judgment, but from the date when the Sanitary District took possession of the condemned property. This was in accord with the Illinois constitutional principle requiring just compensation for taking of property for public use. We think the case is inapposite.

In connection with the *Johnson* case, we note what appears to be a breach of professional ethics on the part of the attorney preparing plaintiff's brief in this Court. He quoted from the *Johnson* case. The correct quotation, 269 Ill. App. at page 434, is:

> "We do not think it is sufficient for the appellant to say that because the appellee appealed the case, it put it beyond the power of appellant to pay the sum of money that had been awarded as damages to the appellee. The appellee had a right to appeal from the decision of the county court. It was the right given him by law, and the mere fact that he prosecuted his appeal, as he was entitled to do under the law, should not prevent him from recovering interest *when the appellant entered and took possession of the property and exercised its rights of ownership over the same.*"

However, the attorney omitted the last nineteen words which we have italicized. Furthermore, he placed a period

and quotation marks after the word "interest" where none such appear in the court's opinion.

We would much prefer to think the omission of the all important words was inadvertent. However, counsel for defendants states the same omission was made in the District Court, and the misquotation was specifically called to the attention of plaintiff's counsel in the trial brief which was filed by defendants.

[4] A sloppy mistake in a quotation might be at least understandable on the part of a careless attorney. But, a deliberate misquotation calls for strong condemnation. However, we do not initiate disciplinary action in this Court because there is a bare possibility that the fact that counsel's quotation was not correct might not have come to the personal attention of the attorney preparing the brief in this Court.

[5] Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinions of other courts as well as other statements therein are completely accurate.

[6] We hold the District Court was in error in denying defendants' motion that they not be required to pay interest from February 20, 1959 to March 2, 1960, the period during which plaintiff's unsuccessful appeal was pending, and directing that defendants pay same.

REVERSED.

PERTINENT PORTIONS OF STATUTES AND RULES.

U. S. C. (1958), Title 28, page 5137, Rules of Civil Procedure, Rule 11:

Signing of Pleadings:

"Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

U. S. C. (1958), Title 28, page 5180, Rules of Civil Procedure, Rule 60:

Relief from Judgment or Order:

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the

following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

U. S. C. (1958), Title 28, page 5186, Rules of Civil Procedure, Rule 67:

Deposit in Court:

"In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court, all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U. S. C. 2041 and 2042; * * *"

Cahill Illinois Revised Statutes (1929), Chap. 47, Eminent Domain, p. 1245, Sec. 10.

Judgment—Payment—Entry—Payment of defendant's costs in event of abandonment:

"The judge or court shall, upon such report, proceed to adjudge and make such order as to right and justice shall pertain, ordering that petitioner enter upon such property and the use of the same upon payment of full compensation as ascertained as aforesaid, within a reasonable time to be fixed by the court, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property. *Provided*, that in case the petitioner shall dismiss said petition before the entry of such order or shall fail to make

payment of full compensation within the time named in such order, that then such court or judge shall, upon application of the defendants to such petition, or either of them, make such order in such cause for the payment by the petitioner of all costs, expenses and reasonable attorney fees of such defendant or defendants paid or incurred by such defendant or defendants in defense of said petition as upon the hearing of such application shall be right and just, and also for the payment of the taxable costs." (Illinois Session Law, 1871-2, p. 402; As amended by Illinois Session Law, 1897, p. 217, May 14.)

Cahill Illinois Revised Statutes (1929), Chap. 47, Eminent Domain, p. 1245, Sec. 13.

Bond—Possession:

"In cases in which compensation shall be ascertained as aforesaid, if the party in whose favor the same is ascertained shall appeal such proceeding, the petitioner shall, notwithstanding, have the right to enter upon the use of the property upon entering into bond, with sufficient surety, payable to the party interested in such compensation, conditioned for the payment of such compensation as may be finally adjudged in the case, and in case of appeal by petitioner, petitioner shall enter into like bond with approved surety. Said bonds shall be approved by the judge before whom such proceeding shall be had, and executed and filed within such time as shall be fixed by said judge." (Illinois Session Law, 1871-2, p. 402.)

Cahill Illinois Revised Statutes (1929), Chap. 47, Eminent Domain, p. 1245, Sec. 14.

Payment of compensation—To county treasurer—To party:

"Payment of compensation adjudged may, in all cases, be made to the county treasurer, who shall, on demand, pay the same to the party thereto entitled taking receipt therefor, or payment may be made to the party entitled, his, her or their conservator or guardian." (Illinois Session Law, 1871-2, p. 402.)

SUPREME COURT U. S
FILED
JUL 20 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 172

QUALITY MOLDING COMPANY, A CORPORATION,
Petitioner,

vs.

AMERICAN NATIONAL FIRE INSURANCE COMPANY, ET AL.,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN P. GORMAN,
JEROME H. TORSHEN,
CLAUSEN, HIRSH, MILLER & GORMAN,
135 S. LaSalle Street,
Chicago, Illinois,
Attorneys for Respondents.

THE BURTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

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OCTOBER TERM, 1960.

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QUALITY MOLDING COMPANY, A CORPORATION,
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AMERICAN NATIONAL FIRE INSURANCE COMPANY, ET AL.,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit is respectfully submitted to this Honorable Court on behalf of American National Fire Insurance Company, The Manhattan Fire and Marine Insurance Company, Law Union & Rock Insurance Company Limited of London, England, Citizens Insurance Company of New Jersey, Westchester Fire Insurance Company, Standard Insurance Company of New York, The Travelers Fire Insurance Company, The American Insurance Company, Paramount Fire Insurance

Company and The Automobile Insurance Company of Hartford, Connecticut, respondents herein, and is in opposition to the Petition for Writ of Certiorari herein sought to review a judgment of the United States Court of Appeals for the Seventh Circuit.

QUESTION PRESENTED.

May a judgment creditor who declares a judgment in its favor to be invalid and unliquidated, and prevents satisfaction thereof by appealing therefrom, receive interest on the judgment during the period of the pendency of its appeal if said appeal is unsuccessful?

STATEMENT OF THE CASE.

Respondents herein adopt as their statement of the case that portion of the opinion of the United States Court of Appeals for the Seventh Circuit rendered on February 20, 1961 and written by Circuit Judge Duffy on behalf of a unanimous court which relates the factual circumstances giving rise to this controversy. Said statement of the case is found in the appendix to the Petition for Writ of Certiorari herein filed by petitioner and appears at pages vi through viii of said appendix. (For purposes of brevity, we do not reprint said statement here.)

Respondents are compelled to disregard the statement of the case found in the petition filed herein for the reason that said statement is in part inaccurate and in part based upon self-serving assertions found not in the evidence but in a "brief" filed by plaintiff in the trial court. These self-serving assertions did not appear in the statement of the case by the Court of Appeals for the Seventh Circuit and were properly disregarded by said court.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT.

Respondents respectfully submit that there is no good reason for this Court to grant the Writ of Certiorari herein sought. Although respondents cannot help but desire the imprimatur of this highest Court upon the decision heretofore rendered by the Court of Appeals for the Seventh Circuit, they are compelled to oppose the granting of this Writ as there is no vital question presented in this case to which this Honorable Court should devote itself. There is no federal question presented in this diversity action.

There is no novel question here relative to the supervision of the Courts of Appeals nor is there any conflict of decisions among the Courts of Appeals of the various circuits on any of the issues herein involved. Furthermore, petitioner has never, either in this Court or in the courts below, brought to the attention of the courts one jot of authority from any jurisdiction which would support the position which it has taken in this cause relative to the accrual of interest during its unsuccessful appeal.

We respectfully state that in our opinion, petitioner, at pages 2 through 4 of its petition in its "Questions for Review", seeks to mislead this Court in much the same manner that it misled the trial court and sought to mislead the Court of Appeals for the Seventh Circuit. See Opinion of the court below, appendix to petition, pages x, xi.

The sole question in this case is whether interest accrues on a judgment during the unsuccessful attack on that judgment by the judgment creditor.

There is no question in this case concerning the jurisdiction of the District Court to change a judgment after a mandate of a Court of Appeals has issued. Obviously, from the opinion of the Court of Appeals for the Seventh Circuit, the District Court was not requested to tamper with the mandate and in fact, acted contrary to law in failing to grant respondents' motion to be relieved from the payment of interest during the pendency of the unsuccessful appeal.

Contrary to petitioner's statement at page 2 of its petition, respondents made no motion to eliminate the judgment provision awarding interest. Instead, they tendered and paid interest up to and including the date at which petitioner filed its notice of appeal from the judgment of the trial court.

Contrary to petitioner's statement at page 2, there is no question in this case concerning Section 60(b) of the Federal Rules of Civil Procedure. This rule had never been

mentioned in either of the courts below. It was not needed and in fact, has no application in the circumstances of the case at bar.

Contrary to petitioner's assertion, Rule 11 of the Federal Rules of Civil Procedure is not involved in this appeal. In the original proceeding in this matter reported in 272 F. 2d 779 and not on appeal here, wherein the judgment rendered in the trial court on petitioner's business interruption claim was affirmed on appeal, respondents here filed an answer denying liability. The case was advanced for trial before respondents could even take the discovery depositions of the officers of petitioner. In his opening statement to the jury, counsel for respondents admitted liability in the amount of $52,497.15. This was reflected in an amended answer filed prior to the close of the case. This admission put petitioner to no additional expense. Petitioner was seeking recovery of a sum more than five times that of $52,000. It could not dissect its claim in such a manner so that in proving the additional $200,000 of alleged damages, it could disregard proof of that amount for which respondents admitted liability. Petitioner did not raise this point in its unsuccessful appeal from the judgment entered in regard to the business interruption claim. It first raised the point on this appeal in its petition for rehearing in the court below. Clearly, Rule 11 has no bearing on the question at issue here and is improperly before this Court.

The facts relative to respondents' attempt to pay the judgment here prior to appeal are detailed in the opinion of the court below. Under the law of Illinois, a formal tender of the amount of the judgment was unnecessary for the reason that tender would be clearly unacceptable to petitioner. *Daren* v. *Downey*, 378 Ill. 543, 39 N. E. 2d 45; *White* v. *Thomas*, 39 Ill. 227; *West Suburban Finance and Thrift Co.* v. *Herbst*, 300 Ill. App. 322, 21 N. E. 2d 37; *Hilker* v. *Radcliff*, 274 Ill. App. 463; *Bregman* v. *Friedman*, 245 Ill. App. 492.

In support of its position, petitioner here, as in the court below, places sole reliance upon *Johnson* v. *Sanitary District of Rockford*, 269 Ill. App. 429. That case was analyzed by the Court of Appeals. See opinion, appendix to the petition, pages ix and x. As stated by Judge Duffy:

"* * * the case is inapposite."

In the court below it has been respondents' position throughout that the law in Illinois has always been that one causing delay in the satisfaction of judgment is not entitled to interest thereon. *Moll* v. *The Sanitary District of Chicago*, 228 Ill. 633 (1907); *Cook* v. *South Park Commissioners*, 61 Ill. 155 (1871); *Kinne* v. *Duncan*, 323 Ill. App. 363, 55 N. E. 2d 545 (Abst. 1944); *McGowan* v. *London & Lancashire Indemnity Co. of America*, 237 Ill. App. 561 (1925); 23 Illinois Law and Practice 32 (Interest, Sec. 64). In addition, respondents cited *State* v. *City of St. Louis*, 234 Mo. App. 209, 115, S. W. 2d 513 and quoted extensively from that case for the reason that it best sets forth the rationale of the rule that a party who appeals from a judgment in its favor is not entitled to interest pending its appeal. Petitioner insists here, as it did in the trial court, that the law of Missouri is different from the law of Illinois.

As shown by the opinion of the court below (see appendix to petition, page viii), the above cited Missouri case was cited and quoted with approval in *Kinne* v. *Duncan*, 323 Ill. App. 363, 55 N. E. 2d 545, the most recent Illinois case on the issue herein. We thus cannot understand why petitioner persists in this line of attack unless it is for the reason that it cannot find one jot of authority to support its position here.

All of the cases cited to this Court by petitioner were before the court below. They were discussed in the briefs. They are clearly inapposite to the issue here.

With all due respect, respondents are compelled to state that this petition is nothing more than an imposition on this Court by a self-seeking, over-reaching claimant, who, in an attempt to obtain an amount to which it is not entitled, has wilfully distorted the law and the facts both in the trial court, the Court of Appeals for the Seventh Circuit and this Court.

The decision of the Court of Appeals is in accord with all settled authority. The Court gave due regard to the Illinois Interest statute and the Illinois decisions which must be read in conjunction therewith. There has been no departure by the Court of Appeals from those high standards which it has consistently maintained. If there has been such a departure "from the accepted and usual course of judicial proceedings" in this case, it is quite clear from the opinion of the Court below that that departure was not by the Court of Appeals but on the part of the attorneys for petitioner.

Petitioner presents neither new argument nor new material in its petition for the Writ of Certiorari. All points raised therein have been fully argued and considered in the Court below. There is no basis for the allowance of the petition.

CONCLUSION.

For the foregoing reasons, respondents respectfully pray that this petition for Writ of Certiorari be denied.

Respectfully submitted,

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 172

QUALITY MOLDING COMPANY, A CORPORATION,
Petitioner,

vs.

AMERICAN NATIONAL FIRE INSURANCE COMPANY, ET AL.,
Respondents.

REPLY TO ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BLAKELY PRINTING COMPANY, CHICAGO

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QUALITY MOLDING COMPANY, A CORPORATION,
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Respondents.

REPLY TO ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Counsel say our "statement is in part inaccurate and in part based on assertions found not in evidence but in a brief filed in the trial court." (Ans. 3.)

Our statement is accurate in every particular.

As recited in the petition, page 8, respondents' made a motion supported by affidavit to modify the judgment provision awarding interest. In opposition petitioner interposed a sworn statement of fact and a brief. The trial judge considered petitioner's verified statement of fact along with the affidavit in support of respondents' motion. The recitals in petitioner's sworn statement that respondents earned 5% or more on the money during the appeal

(Pet. 8; Appendix to Pet. brief below, pp. 6, 8) stood admitted in the trial court.

Counsel say (Ans. 4):

> "*Petitioner at pages 2 through 4 of its petition in its 'Questions for Review,' seeks to mislead this court in much the same manner that it misled the trial court and sought to mislead the Court of Appeals. See Opinion of the court below, appendix to petition, pages x, xi.*" (Ans. 4.)

The above accusation, results from counsel's inability to answer our argument substantiating each question.

1. After the mandate issued, did the district court have jurisdiction to change the judgment provision awarding interest? (Pet. 2.) showed that on this point the Seventh Circuit's reversal is squarely in conflict with: *Butcher* v. *Sherred* (1953, 3 Cir.), 206 F. 2d 259 (Pet. 9-10); *Home Indemnity* v. *O'Brien* (1940, 6 Cir.), 112 F. 2d 387. (Pet. 11.) We also cited two decisions by this court in irreconcilable conflict with the decision of the Seventh Circuit. (Pet. 10.)

In line with those decisions the district judge held:

> "There is the question of my jurisdiction, * * * as to whether or not I can in any way alter that mandate that comes down. What can I do except to follow the mandate? I think I ought to have instructions from the Court of Appeals on that." (Res. App. 22.)

If this rule is to be changed, we respectfully submit that this court should make a pronouncement. Otherwise, the decision of the Seventh Circuit will cause confusion and needless expense to litigants.

2. If one assume the district court had jurisdiction, under Clause 6 of Rule 60 (b), wasn't the district judge vested with discretion? (Pet. 2-3.) Under the holding in *Zurich Genl. Acci. & Liab. Co.* v. *Mid-Continent Pet. Co.* (1930, 10 Cir.), 43 F. 2d 358, the district judge was under a

duty to deny respondents' motion because of filing answers denying liability in flagrant violation of Rule 11. (Pet. 14-15.) In purported justification of the answers denying liability counsel assert they admitted liability in the opening statement. (Ans. 5.) They made no such admission.

Such an admission would not excuse the filing of the false answers.

After petitioner closed its proofs, respondents' counsel argued a motion for a directed verdict that petitioner take nothing. The amended answer stated that petitioner's recovery should be not more than $52,497.15. The trial judge refused to allow the amendment to be filed unless they made an admission of some amount. They then changed the answer with ink. While the printed appendix does not show the ink change, it does appear on the record.

Counsel assert that we did not raise in the Court of Appeals the question of respondents' spurious answers until the Petition for Re-hearing. (Ans. 5.) Respondents' filing of false answers, their admission of liability for $52,497.15 after forcing petitioner to prove every item comprising its case is set forth on page one of petitioner's brief below. We argued orally and in our brief that the filing of the spurious answers was a justification for the court's denying the motion. *Zurich Genl. Acci. & Liab. Co.* v. *Mid-Continent Pet. Co.* (1930, 10 Cir.), 43 F. 2d 355, decided on that point alone (Pet. 14), is cited on pages 18 to 19 of petitioner's brief below. It is there stated: "Here defendants filed answers asserting they owed nothing."

A more flagrant and wilful violation of Rule 11 is inconceivable.

The trial judge in his discretion could deny the motion on the ground respondents realized 5% or more on the money during the appeal.

3. (a) Wasn't the Court of Appeals bound to follow *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429?

In asserting we "sought to mislead the Court of Appeals" (Ans. 4), counsel refer to our omission of an adverbial clause at the end of a quotation from *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, and our castigation by the Court of Appeals. We respectfully submit that the castigation is not justifiable.

In the petition (Pet. 16), we stated *Johnson* v. *Sanitary Dist.*, quoted the opinion (Pet. 16-18), set out the statute, evinced that the omission of the end of the sentence was immaterial. We believe no one can read those pages of our argument without concluding: (a) *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 249, is squarely in point; (b) the refusal of the Court of Appeals to follow it is indefensible; (c) the omission of the adverbial clause, "when the appellant entered and took possession of the property and exercised its right of ownership over the same" (Pet. 19), did not in the slightest misrepresent the holding of the case.

We quoted (Pet. 17) the Illinois court's recapitulation: (a) A condemnation award under the particular statute is not a final judgment until the condemnor pays the money or takes possession. (b) An award begins to draw interest when the condemnor takes possession without depositing the money. We also showed (Pet. 18) why the award was not final until the condemnor takes possession or pays the money.

3. (b) Wasn't the district court bound to apply the Illinois interest statute? (Pet. 4.)

We showed under (b) of point III (Pet. 22-23), Illinois amended its interest statute (Pet. 4-5) to enable a judgment debtor to relieve himself from the rule of *Johnson* v. *Sanitary Dist.* by making a tender. We believe no one can read that statute (Pet. 4-5) as it stood before *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, was decided, and then

read the 1955 amendment (Pet. 5) enacted to give relief from *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, and not conclude that the Court of Appeals' decision is grossly in error.

Respondents' counsel don't try to distinguish *Johnson* v. *Sanitary Dist.* They make no attempt to tell why the Illinois interest statute does not apply. Being unable to answer the argument, they attack counsel.

Counsel refer to the opinion of the Court of Appeals to the effect that the tender would not have been accepted. (Ans. 5.) The trial judge, addressing himself to respondents' counsel, stated:

> "had you made your tender without a condition of a general release * * * there wouldn't be any question about it, he wouldn't be entitled to interest." (Res. App. 22.)

In a total absence of proof the Court of Appeals could not find a tender would not have been accepted. By so doing the Court of Appeals nullifies the Illinois interest statute requiring tender.

Counsel cite *Moll* v. *Sanitary Dist.*, 228 Ill. 633, 81 N. E. 1145. (Ans. 6.) We showed in our petition *Moll* v. *Sanitary Dist.* couldn't have any possible bearing here. (Pet. 21.) For counsel to cite it without showing wherein it has any bearing is an imposition upon this court. (Pet. 21.)

Counsel cite *Kinne* v. *Duncan*, 323 Ill. App. 362, 55 N. E. 2d 545. (Ans. 6.) We showed in the petition *Kinne* v. *Duncan* doesn't have the slightest bearing. (Pet. 21-22.) For counsel to cite *Kinne* v. *Duncan* without showing wherein it has some bearing here, is an imposition on this court.

Counsel cite *McGowan* v. *London & Lancashire I. Co. of A.*, 237 Ill. App. 561. McGowan had leased an apartment to one Bock. McGowan recovered judgment for possession. Bock appealed. London & Lancashire Indemnity Co. signed

the appeal bond. Before perfecting the appeal Bock surrendered possession to McGowan. The appeal was dismissed and McGowan sued on the bond. The trial judge held that McGowan could recover rent for the premises even after he had gone into possession. The Appellate Court reversed and held that the damages awarded on the dismissal of the appeal and the rent to the time when McGowan took possession was the extent of the damages. The case has no bearing here.

We respectfully submit:

1. The holding of the Court of Appeals that the district court had jurisdiction to entertain the motion is in conflict with the law in the other circuits. It cannot but cause confusion. If that principle of law is to be changed, this court should make a pronouncement.

2. If the motion is regarded as properly filed, under Rule 60 (b) the trial court properly denied the motion because of respondents' filing spurious answers. It had discretion to deny the motion on the ground that respondents had made 5% or more on the money during the appeal. Rule 11 was enacted to prevent the filing of spurious answers. The decision by the Court of Appeals that the trial judge had no discretion to deny the motion because of the spurious answers is contrary to the established law. It calls for the exercise of this court's power of supervision.

3. (a) The Court of Appeals in disregarding the holding of *Johnson* v. *Sanitary Dist.* (1933), 269 Ill. App. 429, is such a disregard of the accepted procedure as to call for the exercise of this court's power of supervision.

(b) The disregard by the Court of Appeals of the Illinois interest statute is such a departure from the accepted procedure as to call for the exercise of this court's power of supervision.

We respectfully submit that a writ of certiorari should be issued.

Respectfully submitted,

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